



# Confidentiality and the family courts

## NICHOLAS FAIRBANK AND OLIVIA GAUNT ON DISCLOSING PAPERS FROM FINANCIAL REMEDY PROCEEDINGS IN ENGLAND AND WALES

Family practitioners will be well aware that proceedings in the Family Division of the England and Wales High Court (the and may amount to a contempt of court: see s.12 of the *Administration of Justice Act 1960* (the 1960 Act); *Re B (A Child) (Disclosure)*<sup>1</sup> and *Griffiths v Tickle*.<sup>2,3</sup>

An issue that the authors observe, somewhat anecdotally, arising in practice is the tendency of referencing (and often directly quoting from) proceedings under the Act in FRPs. This regrettably includes counsel's documentation filed with the Family Court. It is important to adhere to the prohibition on disclosing papers from proceedings under the Act into FRPs, particularly with the growing movement towards transparency and open justice in the Family Court.

The President of the Family Division's report *Confidence and Confidentiality: Transparency in the Family Courts*, published in October 2021, talks of 'squaring the circle' between the competing

needs of enhancing public confidence in the Family Court and maintaining the parties' confidentiality. The President stated save that any children will continue to be granted anonymity'.<sup>5</sup> He reiterated this view in *A v M*<sup>6</sup> and undertook a thorough overview of the law on anonymity, going right back to the *Matrimonial Causes Act 1857*, in *Xanthopoulos v Rakshina*.<sup>7</sup>

Similarly, in the 2022 case of *Gallagher v Gallagher*,<sup>8</sup> Mostyn J referred to 'partial privacy' in financial remedy hearings and distinguished the 'secrecy' in children proceedings to those cases not falling within s.12 of the 1960 Act.<sup>9</sup> The court remarked:

*'A hearing which is not covered by s 12 of the 1960 Act, which is heard "in private" (or "in chambers" in times past) has no special significance in terms of confidentiality. The only legal consequence of it being heard in private is that members of the public who are not journalists or bloggers cannot physically attend.*

*Otherwise, in terms of openness, the proceedings are virtually identical to those heard in open court'.<sup>10</sup>*

In other words, those FRPs that are not wholly or mainly about child maintenance do not attract the same level of confidentiality as proceedings concerning children. The approach of Mostyn J (and Judge Holman before him), particularly if more widely adopted, underlines the importance of maintaining the confidentiality of proceedings under the Act and not disclosing material from them into FRPs. Increased transparency in the Family Court, particularly in FRPs, widens the opportunity for harm if a breach is committed. As Mostyn J stated in *Gallagher* (albeit ordering a reporting restriction prohibiting the naming of the subject minor children):

*'The Article 8 rights of the children is not the subject matter of the application by the husband. It is an incidental feature of the application. In my judgment it would need some clear causal evidence ... for indirect identification of the children to be a relevant factor in the balancing exercise.'<sup>11</sup>*

The above authorities demonstrate the shift towards greater transparency in FRPs, including the intention of the former National Lead Judge of the Financial Remedies Court, to move towards a 'new norm' of publishing judgments without anonymisation.

For now, therefore, it is more important than ever for family practitioners to be aware of the rules prohibiting disclosure of papers from proceedings under the Act into FRPs: once papers are in the

**1** [2004] EWHC 411 (Fam) **2** [2022] EWCA Civ 465  
**3** For a helpful summary of the relevant provisions and legal background, the authors refer to the recent article, 'Confidentiality and (un)authorised disclosures of Children Act documents for use in Financial Remedy proceedings', *Family Law Journal*, June 2022. **4** [2021] EWFC 87 **5** At para.113  
**6** [2021] EWFC 89 **7** [2022] EWFC 30 **8** [2022] EWFC 52 **9** At para.12 **10** At para.31 **11** At para.49



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